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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ARTHUR LYNAH ET AL. } No. 45.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES A. WILLIAMS AND AMELIA S. WILLIAMS. } No. 59.

REPLY BRIEF FOR THE UNITED STATES.

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REPLY BRIEF FOR THE UNITED STATES.

I.

THE JURISDICTION.

The cause of action in each of these cases is upon an implied contract to make compensation for lands alleged to have been taken by the Government for public use.

It was stated by the circuit court, and is fully admitted by counsel for defendants in error, that the acts of the Government in placing obstructions in the Savannah River were done in the lawful exercise of its authority to improve the navigation of that river, under the constitutional power to regulate commerce. It is not claimed that there was an improper or negligent

construction of the works by the agents of the Government. It is expressly stated that the Government has not gone into the actual occupancy of these lands. It is perfectly plain that there was no contemplation or intention by the legislation, appropriating for these improvements, to take or to impair, in any manner or in any sense, this property.

The whole contention of the plaintiffs in these cases is that the Government caused a total destruction of their property by the erection of works in the Savannah River for the improvement of its navigability, and that this was a taking of their lands, within the meaning of the Constitution—providing for just compensation for taking private property. But if the taking was resultant upon an injury or disturbance of one's right to property, how is there a consideration for a contract to make compensation? Nor can it be said that the tort may be waived and a suit brought on a contract. Under the circumstances here the supposed contract springs from the tort. But the tort, which may be waived, must be because of the contract. As this court said, in *Lloyd* v. *Hough* (1 How., 153, 159), "Whatever, then, excludes all idea of a contract, excludes at the same time a remedy which can spring from contract only, which affirms it, and seeks its enforcement."

The act of March 3, 1887, under which these suits were brought, permits the Government to be sued upon contracts, express or implied. The jurisdiction of the court is limited to cases of contract. Cases sounding

in tort were expressly excluded. As was said by Justice Miller in *Langford* v. *United States* (101 U. S., 341, 344), "There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law."

This was said in a case brought under the act of 1863, establishing the jurisdiction of the Court of Claims, which did not contain the express exclusion of cases "sounding in tort," embodied in the law of 1887.

Can there be any doubt that the plaintiffs in the cases at bar make "an attempt, under the assumption of an implied contract," to hold the Government responsible for a tort? The remedy which would, if available, have been sought is, as in the case of *Pumpelly* v. *Green Bay Company*, trespass on the case.

Moreover, the Government claims that all the acts of its officers and agents in and about the improvement of navigation of the Savannah River were lawfully done under the power granted in the Constitution to regulate commerce, and that whatever damage or injury was done, by reason of those acts, to the shore lands, the lands between high-water mark and low-water mark, was done by virtue of the paramount right of the United States, to which the right and interest of the plaintiffs were subject, and for which the United States was not liable to make compensation.

This claim was made throughout the whole of the proceedings in the circuit court, and in various forms its denial is assigned for error.

This matter was fully considered in *Hill* v. *United States* (149 U. S., 593). That was a case against the United States, for use and occupation, for a lighthouse, of submerged land, the title to which, and the exclusive right to build thereon, were asserted by the plaintiff. The defendant pleaded that the land referred to and described in the petition is submerged land and part of the bottom of the Chesapeake Bay, one of the navigable waters of the United States, and that the defendant, under the law, for the purposes of a lighthouse, has a paramount right to its use as against the plaintiff or any other person. To this plea the plaintiff demurred, the court overruled the demurrer and gave judgment for the United States.

Mr. Justice Gray, in delivering the opinion of this court, said:

> In *Langford* v. *United States* (101 U. S., 341), it was accordingly adjudged that when an officer of the United States took and held possession of land of a private citizen, under a claim that it belonged to the Government, the United States could not be charged upon an implied obligation to pay for its use and occupation.
>
> It has been since held that if the United States appropriates to a public use land which they admit to be private property, they may be held, as upon an implied contract, to pay its value to the owner. (*United States* v. *Great Falls Manuf. Co.*, 112 U. S., 645, and 124 U. S.,

581.) It has likewise been held that the United States may be sued in the Court of Claims for the use of a patent for an invention, the plaintiff's right in which they have acknowledged. (*Hollister* v. *Benedict Manuf. Co.*, 113 U. S., 59; *United States* v. *Palmer*, 128 U. S., 262.) But in each of these cases the title of the plaintiff was admitted, and in none of them was any doubt thrown upon the correctness of the decision in *Langford's case.* (See *Schillinger* v. *United States*, 24 C. Cls. R., 278.)

The case at bar is governed by *Langford's case.* It was not alleged in this petition, nor admitted in the plea, that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States. The plaintiff asserted a title to the land in question, with the exclusive right of building thereon, and claimed damages of the United States for the use and occupation of the land for a light-house. The United States positively and precisely pleaded that the land was submerged under the water of Chesapeake Bay, one of the navigable waters of the United States, and that the United States, "under the law, for the purpose of a light-house, has a paramount right to its use as against the plaintiff or any other person;" and the plaintiff demurred to this plea. The circuit court, instead of rendering judgment for the United States upon the demurrer, should have dismissed the suit for want of jurisdiction.

Nor is the standing of the plaintiffs made any stronger by adverting to the language of the act of

1887, as giving jurisdiction of "all claims founded upon the Constitution of the United States." This court, by Mr. Justice Brewer, said, speaking of this provision, in *Schillinger* v. *United States* (155 U. S., 163, 168):

> But that does not include claims founded upon torts any more than "all claims founded upon any law of Congress" found in the prior act. The identity of the descriptive words excludes the thought of any change.
>
> It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the Government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the Government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would clearly have been avoided.

> It is true also that to jurisdiction over claims founded "upon any contract, expressed or implied, with the Government of the United States," is added jurisdiction over claims "for damages, liquidated or unliquidated," but this grant is limited by the provision "not sounding in tort." This limitation, even if qualifying only the clause immediately preceding, and not extending to the entire grant of jurisdiction found in the section, is a clear indorsement of the frequent ruling of this court that cases sounding in tort are not cognizable in the Court of Claims.

This language is equally applicable to the district and circuit courts of the United States, which were given concurrent jurisdiction with the Court of Claims to hear and determine claims against the Government, with limitations as to amounts.

The cases at bar are certainly cases "sounding in tort." The petitions state such a case unmistakably. The transactions, as alleged, "exclude all idea of a contract."

In the findings of fact, (and they are substantially the same in both cases), in the *Lynah case*, it is said:

> A certain parcel of this plantation, measuring about 420 acres, had been reclaimed by drainage and had been in actual continued use for seventy years and upward as a rice plantation, used solely for this purpose. This rice plantation was dependent for its irrigation upon the waters of the Savannah River, and its ditches, drains, and canals, through and by

> which the waters of the river were flowed in and upon the lands and were then drained therefrom, were adapted to the natural level of the said Savannah River, and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of the said river in, through, and over its natural channel along its natural bed to the waters of the ocean.
>
> This portion of the plantation dedicated to the culture of rice was protected from the river by an embankment, etc.

It is true that these lands have been reclaimed. It is true they have been reclaimed at much labor and expense, to the credit of the enterprising citizen and to the profit and honor of the Commonwealth. But this is a different kind of reclamation from that which made "the passage near the town of Lymington near the bridge," in the harbor of Portsmouth, or the reclamation of the mud flats of Massachusetts and New Jersey, or the filled-in lands in Lake Michigan and the Bay of San Francisco. All these lands, whether embanked or filled in, were permanently protected from the action of the waters. Where they were submerged lands or shore lands their character was changed. They became *terra firma*. Nobody going in under a grant and having possession for seventy years *could be removed*.

But these lands were not so reclaimed. They were only temporarily relieved from the action of the ordinary tides. Their relation to the Savannah River was only interrupted, not destroyed. In this connection,

see *Davidson et al.* v. *Boston & Maine R. R.* (3 Cush., 91, 105).

It can not be gainsaid that it was legitimate, proper, wise, and fully within their authority, for the State or the United States to improve the navigability of this river. Increasing the depth of water, whether by dredging the bottom or raising the level of the river, was of first importance. In effecting that object, in a proper manner, could the Government be hampered or controlled by those having the shore in possession, even by proper grant? Was it not rather incumbent upon those in possession to protect their possession?

II.

THE TITLE OF PLAINTIFFS TO THESE LANDS

It seems to be contended by counsel for defendants in error that the title to the shore in the Crown or the State was different from the title in submerged lands; but this is not so.

> Below this ordinary high-water mark down to the low-water mark, i. e., between the ordinary high and low water marks, lies the *shore* or *littus maris*. This shore, throughout the coasts of England, as well of the sea as of creeks and tide rivers, doth, *de jure communi*, belong to the King. In this respect, as matter of title, it would seem to be part of the *fundum*, or sea bottom, which, as before said, belongs also to the King. (Hall on Seashore, 13.)
>
> And this right of the sovereign extends to ordinary high-water mark, so that the shore,

> which is the space between high-water and low-water mark, belongs also to the sovereign.
>
> * * * * *
>
> So that by virtue of the grant from the Plymouth Company, the charter of King Charles, and actual possession and disposition of it, the people of the colony, in their politic capacity, succeeded to all the territorial rights, franchises, and immunities which had ever belonged to the sovereign power of the parent country. (*Commonwealth* v. *Charlestown*, 1 Pick., 130, 132, 133.)
>
> When the Crown conveys to private individuals the legal title to the shore, they become entitled to exercise such acts of ownership there as the Crown itself could have done, and no more; the proprietary rights in the beach thus acquired by them are therefore subordinate to the general interests of the public. (Phear on Water Rights, 46.)

There is no disguise in the attempt to bring these cases, not only within the principles, but within the circumstances, of the case of *Pumpelly* v. *Green Bay Co.* (*supra*). The allegation of the petitions and the findings of the court, and the conclusions of law reciting those findings, are all based upon that case.

But the *Pumpelly case* was a suit in trespass. It was not brought under the act of March 3, 1887. The United States was not the defendant.

The superimposed materials upon the lands of the plaintiff destroyed the natural condition of the land, and completely wiped out an indefeasible estate. And the court decided that was a taking within the provi-

sion of the Constitution, for which the defendant was bound to make compensation in the action brought.

So was the case of *Eaton* v. *The Boston, &c., R. R.* (51 N. H., 504).

And these cases are entirely different in all the particulars we have mentioned from *United States* v. *Monongahela Nav. Co.* (148 U. S., 312); *Kaukauna Water Power Co.* v. *Green Bayou Co.* (142 U. S., 254), and the other cases cited by the learned counsel for defendants in error.

Respectfully submitted.

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